

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SNOHOMISH COUNTY FARM BUREAU,

Petitioner,

v.

SNOHOMISH COUNTY AND WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

CASE No. 12-3-0008

(SCFB I)

ORDER ON MOTIONS

This matter came before the Board on motions of various parties, including cross-motions for dispositive rulings under WAC 242-03-560. The Board has before it the following:

- Petitioner's Motion to Consolidate, filed November 9, 2012
- Snohomish County's and Washington State Department of Ecology's Joint Response to Petitioner's Motion to Consolidate, filed November 19, 2012
- Petitioner's Motion for Disposition under WAC 243-03-560 [sic] [public process] and in the alternative To Supplement the Record under WAC 243-03-565 [sic], filed November 19, 2012
- Snohomish County and Washington State Department of Ecology's Joint Response to Petitioner's Motion for Disposition and Motion to Supplement the Record, filed November 28, 2012
- Petitioner's Reply to Respondents' Response to Petitioner's Motion for Disposition and in the alternative to Supplement the Record, filed December 5, 2012
- Snohomish County's Motion to Strike Petitioner's Reply, Declaration of Ralph Ferguson, Declaration of Rone Brewer, and WSDOT Declaration of Emergency, filed December 7, 2012
- Petitioner's Response to Respondents' Motion to Strike, filed December 10, 2012
- Snohomish County's and Washington State Department of Ecology's Joint Dispositive Motions, filed November 19, 2012
- Petitioner's Response to Respondents' Joint Dispositive Motions, filed November 28, 2012

- Snohomish County's and Washington State Department of Ecology's Joint Reply to Petitioner's Response to Respondents' Joint Dispositive Motions, filed December 5, 2012

No oral argument was scheduled.

I. MOTION TO CONSOLIDATE

Petitioner Snohomish County Farm Bureau (Farm Bureau) moved to consolidate this matter with Case No.12-3-0010 (*SCFB II*), which challenges Snohomish County's adoption of Ordinance 12-047. In its Notice of Hearing and Preliminary Schedule for *SCFB II*, the Board proposed coordinating the case schedules for hearing both petitions, as the subject matter is related. At the Prehearing Conference for *SCFB II*, after hearing the objections of the parties, the Board determined that it will not coordinate the schedules for Case Nos. 12-3-0008 and 12-3-0010, and the cases will not be consolidated.¹

The Motion to Consolidate is **denied**.

II. DISPOSITIVE MOTIONS AND SUPPLEMENTATION OF THE RECORD

Legal Issue 1 – Amend the Issue Statement

The Farm Bureau's Legal Issue 1 challenges adoption of the County's Shoreline Master Program as noncompliant with various provisions of the GMA and SMA. The County and Ecology move to dismiss the Farm Bureau's claims based on RCW 36.70A.060, .020, and .100. Respondents state RCW 90.58.190(2)(b) limits the basis of Growth Management Hearings Board review. RCW 90.58.190(2)(b) provides (emphasis added):

If the appeal to the growth management hearings board concerns **shorelines**, the growth management hearings board shall review the proposed master program or amendment *solely for compliance with* the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, *the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105*, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.²

¹ Case No. 12-3-0010, Prehearing Order, at 1 (December 12, 2012).

² Emphasis added.

1 In response to the motion, the Farm Bureau acknowledges that the reference to RCW
2 36.70A.060, .020, and .100 in Legal Issue 1 must be deleted.

3
4 Accordingly, Petitioner's challenges to compliance with RCW 36.70A.020, .060, and 100 are
5 **dismissed**. The Issue Statement for Legal Issue I is revised accordingly.
6

7
8 Legal Issue 2 - Dismissed

9 The Farm Bureau's Legal Issue 2 challenges the County's failure to hold a Planning
10 Commission Public hearing on Amended Ordinance 12-025. The County and Ecology
11 move to dismiss this issue pursuant to WAC 242-03-560, which provides for summary
12 disposition of certain procedural challenges by motion:

13 Dispositive motion on notice and public participation. Any party may bring a
14 motion for the board to decide a challenge to compliance with the notice and
15 public participation requirements of the act raised in the petition for review,
16 provided that the evidence relevant to the challenge is limited.

17 Respondents argue, first, that the legal basis for the Farm Bureau's case is flawed, and
18 second, that in any event, the required Planning Commission hearing was properly held.
19

20 In response to the motion, the Farm Bureau acknowledges Legal Issue 2 must be
21 dismissed.
22

23 Accordingly, Legal Issue 2 is **dismissed**.
24

25 Legal Issue 4 - Dismissed

26 The parties filed cross-motions for dispositive ruling on Legal Issue 4. As set forth in the
27 Prehearing Order, Legal Issue 4 states:

28 Does Ordinance 12-025 fail to comply with the SMA and applicable guidelines,
29 including but not limited to RCW 90.58.100, RCW 90.58.130 and WAC 173-26-
30 201, because in developing the SMP update enacted in 12-025 and its exhibits
31 and attachments Snohomish County and DOE failed to invite and encourage
32 the participation by all agencies of federal, state, and local government having

1 interests or responsibilities relating to the shorelines of the state?

2 The Farm Bureau's Motion for Disposition under WAC 242-03-560 asserts the County and
3 Ecology violated RCW 90.58.100(1)(b) and RCW 90.58.130(2) by failing to notify and confer
4 with five agencies:
5

- 6 • U.S. Department of Agriculture,
- 7 • Washington State Department of Agriculture,
- 8 • Diking District 5,
- 9 • Diking District 1, and
- 10 • Juniper Beach Water District.

11 The Farm Bureau relies on the distribution list attached to the July 13, 2004, letter from
12 Craig Ladiser, Snohomish County Planning and Development Services Director, inviting
13 various organizations to nominate representatives for a Shoreline Advisory Committee to
14 assist in developing the SMP Update.³
15

16 The Respondents' Joint Dispositive Motion also requests summary disposition of Legal
17 Issue 4. The County and Ecology argue the Farm Bureau lacks standing to object to failure
18 of notice because this alleged defect was never identified in the Farm Bureau's testimony,
19 emails, or letters concerning the SMP update. Respondents further provide the distribution
20 lists for various components of the SMP adoption process to demonstrate the breadth of
21 their public outreach and seek a summary determination of compliance.
22

23 Respondents' Motion to Dismiss Legal Issue 4 for Lack of Standing - Denied
24

25 RCW 36.70A.280(2) governs the standing requirements for appearing before the Boards. It
26 provides, in relevant part:

27 A petition may be filed only by: . . . (b) *a person who has participated orally or*
28 *in writing before the county or city regarding the matter on which a review is*
29 *being requested.* (Emphasis supplied).

30 In *Wells v. Western Washington Growth Management Hearings Board (Wells)*, 100 Wn.
31

32 ³ S-1 and S-2 of County Index

1 App. 657, 999 P.2d 405 (2000), the Court of Appeals clarified that participation standing
2 under the GMA is not issue-specific: “our conclusion [is] that the Legislature did not intend
3 petitioners to raise specific legal issues during the local government planning process.”
4 *Wells*, 100 Wn. App. at 672. The *Wells* court held that a “matter,” as intended by RCW
5 36.70A.280(2)(b), is not the equivalent of an “issue.” *Id.* at 671. The *Wells* court concluded
6 that “matter” in RCW 36.70A.280(2)(b) refers to a broad “subject or topic of concern or
7 controversy.” *Id.* at 672-3. The court said: “it would be unrealistic given the time and
8 resource constraints inherent in the planning process to require each individual petitioner to
9 demonstrate to the growth management hearings board that he or she raised a specific
10 legal issue before the board can consider it.” *Id.* at 674.

11
12
13 The *Wells* holding has been codified in RCW 36.70A.280(4):

14 (4) To establish participation standing under subsection (2)(b) of this section,
15 a person must show that his or her participation before the county or city was
16 reasonably related to the person's issue as presented to the board.

17 The parties agree the Farm Bureau participated in Snohomish County’s public process for
18 adoption of Ordinance 12-025. Indeed, Respondents provide a number of letters,
19 summaries of testimony, and emails documenting the Farm Bureau’s comments. The
20 County contends the Farm Bureau comments never raised the issue of failure to notify or
21 consult the five indicated agencies, and therefore the Farm Bureau lacks standing on Legal
22 Issue 4.
23

24
25 The Board does not find the Respondents’ arguments persuasive. The County raised the
26 same argument in *McNaughton v Snohomish County*,⁴ where the Board concluded:

27 Petitioner was not required to frame its legal theories before the County
28 Council in order to preserve the right to challenge compliance with various
29 provisions of the GMA in its PFR.

30 Here, during the County’s public process, the Farm Bureau clearly indicated its opposition to
31

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4 GMHB Case No. 06-3-0027, Order on Motions (October 30, 2006), at 11.

1 the ordinance which amended the Shoreline Master Program and its concern the new SMP
2 would have negative effects on agriculture, dikes and levees, and water supply. In its
3 participation, the Farm Bureau “was not required to detail the alleged deficiencies or
4 articulate its legal theories.”⁵ The Board determines the Farm Bureau has standing to bring
5 a petition challenging adoption of the SMP, as provided in RCW 36.70A.280(2), because it
6 provided testimony at hearings, sent letters and otherwise participated in the County’s
7 process for adoption of its updated SMP, as demonstrated by exhibits attached to the
8 Respondents’ Joint Response. Legal Issue 4 is reasonably related to the adoption of the
9 updated SMP, and to the preservation of farmland which is a consistent theme of the
10 testimony and mail.
11

12
13 Respondents’ motion to dismiss Issue 4 for lack of standing is **denied**.
14

15 Respondents’ Cross-Motions on Compliance with RCW 90.58.100(1)(b) and .130(2)

16 RCW 90.58.100(1) provides, in relevant part:

17 In preparing the master programs, and any amendments thereto, the
18 department and local governments shall to the extent feasible: ... (b) Consult
19 with and obtain the comment of any federal, state, regional, or local agency
20 having any special expertise with respect to any environmental impact.

21 RCW 90.58.130 provides:

22 To ensure that all persons and entities having an interest in the guidelines
23 and master programs developed under this chapter are provided with a full
24 opportunity for involvement in both their development and implementation, the
25 department and local governments shall: ... (2) Invite and encourage
26 participation by all agencies of federal, state, and local government, including
27 municipal and public corporations, having interests or responsibilities relating
28 to the shorelines of the state. State and local agencies are directed to
29 participate fully to insure that their interests are fully considered by the
30 department and local governments.

31 The County and Ecology assert the record demonstrates they satisfied the outreach and
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⁵ *McNaughton* at 9.

1 consultation requirements of the SMA when they developed and adopted the SMP. The
2 County provides its SEPA distribution lists and Ecology provides its Excel Mailing Lists used
3 in the SMP adoption process.⁶ The Board notes the lists include scores of federal, state
4 and local agencies and organizations, as well as individuals.

5
6 The Farm Bureau argues the County and Ecology were obligated to include the five omitted
7 agencies because of the likely impact of proposed shoreline restoration projects that will
8 inundate farmland and increase saltwater intrusion into drinking water aquifers. The County
9 in response points out its first notice (S1 and 2) was sent to the Coordinated Diking Council,
10 effectively notifying the Diking Districts 1 and 5. With respect to the US and State
11 Departments of Agriculture, the County and Ecology contend the Farm Bureau hasn't
12 demonstrated these agencies have "interests or responsibilities relating to the shorelines of
13 the state" as required in RCW 90.58.130(2) or have "special expertise with respect to any
14 environmental impacts" as required by RCW 90.58.100(1)(b). Many Snohomish County
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16

17 ⁶ **Snohomish County's Index to the Record**

Exhibit/Index #	Description
S1	July 13, 2004, Letter From Snohomish County PDS Asking Key Shoreline Stakeholders To Nominate Members for the Shoreline Advisory Committee
S2	List of Addresses Where Exhibit # S1 Letter Was Sent
1.2.1	Excerpts (3 pages) from Draft Environmental Impact Statement of the Proposed Shoreline Management Program (May 2006)
1.2.2	Excerpts (4 pages) from Final Environmental Impact Statement of the Proposed Shoreline Management Program (June 2006)
1.2.12	Excerpts (5 pages) from Final Environmental Impact Statement of the Proposed Shoreline Management Program (August 2010)

27 **Department of Ecology's Index to the Record**

Exhibit/Index #	Description
E.1.17	State-NW-Region Excel Mailing List
E.1.18	Snohomish County Parties of Record Public Excel Mailing List
E.1.19	Snohomish County Public Email List

1 water districts are on the distribution lists, but the County points out Juniper Beach Water
2 District is in Island County, not in Snohomish County, and so would not be on the County's
3 list for planning notification.

4
5 The Board concurs with the County and Ecology. The record before the Board
6 demonstrates the outreach and consultation requirements of RCW 90.58.100(1)(b) and
7 RCW 90.58.130(2) have been amply satisfied.

8
9 RCW 90.58.100(1)(b) requires consultation "to the extent feasible" with agencies having
10 special expertise in environmental impacts. While presumably the federal and state
11 agricultural agencies have some environmental expertise, Shoreline Master Program
12 development does not mandate outreach to every possible entity, but rather, reasonable
13 efforts "to the extent feasible." The Board finds and concludes County and Ecology
14 distribution and mailing lists demonstrate outreach "to the extent feasible" to agencies
15 having "special expertise in environmental impacts," and thus satisfy RCW 90.58.130(2).

16
17
18 RCW 90.58.130(2) requires invitations to all federal, state, and local agencies "having
19 interests or responsibilities relating to the shorelines of the state." It was not an error to omit
20 the federal and state agricultural departments from that list. Nor was it error for Snohomish
21 County to omit a water district from another county from its invitation to "local agencies."
22 The Board finds and concludes the County and Ecology distribution and mailing lists
23 demonstrate invitation to federal, state, and local governments having "interests or
24 responsibilities relating to the shorelines" and thus satisfy RCW 90.58.130(2).

25
26
27 Petitioner's dispositive motion regarding Legal Issue 4 is **denied**. The Respondents' joint
28 motion for dismissal of Legal Issue 4 pursuant to WAC 242-03-560 is **granted**. Legal Issue
29 4 is **dismissed**.

30
31 Supplementation of the Record and Motion to Strike

32 The Farm Bureau filed a timely motion to supplement the record with three documents:

- Withdrawal of DNS for Smith Island Restoration Project, June 2009
- DSEIS Smith Island Restoration Project, June 2011
- SEPA checklist for Leque Island Setback Levee, November, 2007

The Respondents' joint response, without a motion, included as Appendix A an order in a Pollution Control Hearings Board (PCHB) Case that is not in the record.⁷ The Farm Bureau replied with a summary of the facts that form the basis of its concern, supported by three documents:

- Declaration of Ralph Ferguson of Camano Water Systems Association, November 4, 2010, in PCHB Case Nos. 10-124, 10-135, and 10-138 (Consolidated)
- Declaration of Rone Brewer, Vice President, Washington Waterfowl Association, November 4, 2010, in PCHB Case Nos. 10-124, 10-135, and 10-138 (Consolidated)
- WSDOT Declaration of Emergency July 8, 2010 re SR 532 dike repair

The County and Ecology moved to strike the Farm Bureau's Reply and attachments as outside the record, beyond the scope of the matters raised, and irrelevant to the issues before the Board. The Farm Bureau replies that the reply and attachments go to the County's *intent* to violate the GMA.

The Board **strikes** Respondents' Appendix A. The Board finds the PCHB Order is not necessary or of assistance to our decision in the present case.

The Board **reserves decision** on the Farm Bureau's motion to supplement and Respondents' motion to strike. The issues in this case have now been narrowed considerably. The only remaining question before the Board with respect to the GMA is *whether the adopted SMP update is inconsistent with Snohomish County's Comprehensive Plan (GPP)* in violation of the internal consistency provisions of RCW 36.70A.070 and/or RCW 36.70A.040.⁸ The Board assumes good faith on the part of public officials, does not generally look to motivation, but reviews the actual language of the challenged ordinance. If

⁷ *Juniper Beach, et al v WDFW, et al*, PCHB Case No. 11-176c, Order Granting Summary Judgment (May 16, 2012).

⁸ A remaining issue with respect to the SMA is Legal Issue 3 concerning the County's definition of "shorelands."

1 inconsistency is argued, the Board looks to see if the language of one provision contradicts
2 or thwarts another. When the parties have briefed and argued this more narrow and
3 focused issue, the Board will determine whether the requested supplementation is
4 necessary or of substantial assistance to its decision.
5

6 III. ORDER

7 The Board rules on the motions of the parties as set forth above.
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9 DATED this 17th day of December, 2012.
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12 _____
Margaret A. Pageler, Board Member

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14 _____
William P. Roehl, Board Member

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16 _____
Cheryl Pflug, Board Member
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21 **Note: This is not a final decision in this case. Pursuant to WAC 242-03-555(4) and**
22 **WAC 242-03-830(1) no motion for reconsideration may be filed.**
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